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No. 92-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS ANDRES ESQUIVEL-BERRIOS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our certiorari petition, we demonstrated that there is an irreconcilable conflict among the circuits concerning whether the Due Process Clause prohibits the Immigration and Naturalization Service ("INS") from basing a decision to deny asylum on official notice of hotly-disputed facts without giving the applicant any prior warning or opportunity to present contrary evidence. In its brief in opposition, the INS does not address the compelling need for review of this serious constitutional issue. Instead, the INS claims that even though the court of appeals expressly decided the due process issue, somehow that issue was not properly preserved. The INS's argument is frivolous; not only was that issue presented to the court of appeals and vigorously litigated by both sides, but it was specifically decided by that court as to petitioner.

The INS's brief in opposition in *Rhoa-Zamora v. INS*, No. 92-1299, effectively concedes that the due process issue raised in our petition warrants review.[1] In *Rhoa-Zamora*, the INS acknowledges the circuit split, but opposes certiorari on the basis of purported jurisdictional defects in *Rhoa-Zamora* that are *not* present here. Indeed, the INS has not challenged the fact that the decision of the court of appeals below with respect to petitioner is indistinguishable from that of the Ninth Circuit in *Castillo-Villagra* and the Sixth Circuit in *Ulloa*. What is more, subsequent court of appeals' decisions confirm that the split will only continue to deepen. These decisions demonstrate the compelling need for immediate resolution of this conflict by the Court.

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[1] The certiorari petitions in this case and in *Rhoa-Zamora* arise from the same consolidated opinion of the Seventh Circuit. The INS filed its brief in opposition to each petition on the same day and we anticipate that the Court will consider the petitions together.

I. THE DUE PROCESS ISSUE WAS FULLY RAISED BY PETITIONER AND DECIDED BY THE COURT OF APPEALS AND IS PROPERLY BEFORE THIS COURT

The INS contends that the due process issue presented in the petition was not properly raised in the court of appeals and thus not appropriate for review by this Court. That is simply incorrect. The court of appeals expressly decided the issue, and it was properly presented by petitioner to that court.

The INS's assertion that "the court of appeals did not consider whether petitioner was deprived of due process" (Br. in Opp. 7) through its use of official notice is wrong. As explained in the petition (at 6-8), the court of appeals first held in the course of addressing the claims of Rhoa-Zamora that "due process does not require the Board to give an asylum applicant the opportunity to rebut noticed facts prior to reaching a decision." Pet. App. 14a. The court then specifically applied that holding to petitioner's claim and held that his due process rights were satisfied by his ability to file a discretionary motion to reopen with the Board:

> Because the Board did not provide Berrios with an opportunity to rebut the noticed facts prior to deciding his case, Berrios has a due process right to have [his rebuttal] evidence considered. *Kaczmarczyk*, 933 F.2d at 597. In order to do so, however, he must file a motion to reopen with the Board. *Id.*

Pet. App. 19a. Petitioner's due process issue -- whether the INS violated the Due Process Clause by denying his asylum claim based solely on administrative notice of adjudicative facts without prior notice or the opportunity to present contrary evidence -- is derived from this quoted language in the court of appeals' decision.

This Court has long held that a question is properly presented for review if that question was actually decided by the court of appeals. As explained most recently in *United States v. Williams*, 112 S.Ct. 1735 (1992):

> Our traditional rule * * * precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions.

Id. at 1738-39, citing *Stevens v. Department of Treasury*, 111 S.Ct. 1562, 1567 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 111 S.Ct. 2749, 2761 n.8 (1991). Accordingly, the Court need go no further to conclude that the due process issue is properly before the Court.

In any event, the INS's claim that petitioner failed to argue in the court of appeals that the Board's use of official notice violated due process is also incorrect. Petitioner's brief specifically argued that "due process requires that Berrios be given the opportunity to rebut the BIA's officially-noticed factual findings," that "because the BIA gave no prior notice that it intended to rely entirely upon facts which were not contained in the record," and because the Board "focused upon events which had not even occurred before the parties' briefs were filed and submitted for decision," "Berrios is constitutionally entitled to refute the accuracy of [the Board's officially noticed] facts." Pet. C.A. Br. 41-43.[2] Petitioner also argued

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[2] The INS also fails to inform the Court that petitioner filed a motion for leave to adduce additional evidence pursuant to 28 U.S.C. § 2347(c) in which he (along with the other petitioners) argued that the Board's use of official notice violated the Due Process Clause and that a remand was required under Section 2347(c). The INS in turn responded to this

that reopening mechanisms at the Board would not provide him with an adequate method of rebutting the Board's officially noticed findings and that the only proper remedy would be to vacate the Board's decision and remand the proceedings pursuant to 28 U.S.C. § 2347(c). *Id.* at 46-47. These are the precise arguments now presented in the petition and plainly were preserved by petitioner for review.

In the particular context of this case, the INS's assertion that review would be inappropriate borders on the disingenuous. The court of appeals' opinion decided three consolidated cases. *Juresma-Altamirano v. INS*, No. 91-1513; *Esquivel-Berrios v. INS*, No. 91-1551; and *Rhoa-Zamora v. INS*, No. 91-1949. In its Order consolidating the cases, the court of appeals told the parties to avoid duplication of issues in their briefs, and sternly warned that "[d]uplicative briefing will be stricken and may result in disciplinary sanctions against counsel." Court of Appeals' Order of May 15, 1991. In light of those instructions, the parties coordinated their briefing. Petitioner raised the due process issue, but concentrated his briefing on other issues; the brief filed by Rhoa-Zamora emphasized the due process points. The INS's brief then fully explored the due process issues as to all of the parties (without any claim that the issue had been waived by any party), and the court examined and decided the due process issue as to all of the parties.[3]

Because the due process issue was fully briefed in the court of appeals and was expressly decided by that court, none of the prudential concerns that might cause the Court to hesitate to

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substantive issue. The court of appeals informed the parties that it would consider the issues raised by the motion along with the parties' merits briefs. Copies of these pleadings are being lodged with the Clerk's Office.

[3] We have lodged copies of the court of appeals briefs filed by Rhoa-Zamora and the INS with the Clerk.

review an issue decided by a lower court without the benefit of full briefing exist in this case. In light of the court of appeals' warning against duplicative briefing, and the facts that petitioner raised the due process issue, the issue was fully briefed by both sides and decided by the court, it would be inequitable in the extreme to deny review because the petitioner heeded the court of appeals' warnings and did not dedicate more of his brief to the due process issue.

II. THE COURTS OF APPEALS ARE IRRECONCILABLY IN CONFLICT ON EACH OF THE QUESTIONS PRESENTED

1. The INS does not dispute the conflict among the circuits on the due process issue. To the contrary, the INS's brief in opposition in *Rhoa-Zamora* acknowledges (at 8-9), as it must, that the decisions of the Ninth Circuit in *Castillo-Villagra v. INS*, 972 F.2d 1017 (1992) and the Sixth Circuit in *Ulloa v. INS*, 944 F.2d 905 (1991), reprinted at Pet. App. 27a-30a, are irreconcilably at odds with the decision of Seventh Circuit in this case and those of the Fifth and District of Columbia Circuits as well. What is more, subsequent decisions of the Seventh and Ninth Circuits confirm that the conflict on the due process issue will only continue to deepen. See *Gomez-Vigil v. INS*, ___ F.2d ___, 1993 WL 84945 (9th Cir. March 26, 1993) (following *Castillo-Villagra*); *Acewicz v. INS*, 984 F.2d 1056 (9th Cir. 1993) (same); *Sivaainkaran v. INS*, 972 F.2d 161 (7th Cir. 1992) (following holding below).[4]

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[4] In opposing certiorari in *Rhoa-Zamora*, the INS relies entirely on jurisdictional issues and factual distinctions that are *not* applicable here. *First*, the INS argues that certiorari should be denied there because of a threshold jurisdictional issue that clearly is not present here. See *Rhoa-Zamora* Br. in Opp. 5-6. *Second*, the INS claims that *Rhoa-Zamora* is factually distinguishable from decisions of other circuits because Rhoa-Zamora filed a motion to reopen at the Board and because that motion was denied. *Id.* at 6-8. Once again, that distinction is inapplicable here given

The INS argues in *Rhoa-Zamora*, however, that the conflict among the circuits here is insignificant because all of the circuits are in agreement that the Due Process Clause guarantees an opportunity to rebut officially noticed facts. *Rhoa-Zamora* Br. in Opp. 10. But this argument entirely begs the question because the conflict raised in the petition concerns an application of that indisputable principle, *i.e.*, whether the Due Process Clause requires a prior opportunity to present rebuttal evidence or whether discretionary reopening mechanisms at the agency level are constitutionally sufficient.

2. The INS's effort to explain away the conflict among the circuits on the second question presented is belied by a plain reading of the court of appeals' decision which expressly acknowledged the conflict it had created. Pet. App. 17a & n.9. The INS concedes that the court of appeals held that Section 2347(c) relief cannot be granted where reopening mechanisms are available at the Board. Pet. App. 16a-17a. But the INS points to the Seventh Circuit's decision in *Osaghae v. INS*, 942 F.2d 1160 (1991) as proof that "the Seventh Circuit in fact does apply Section 2347(c) to decisions of the Board." Br. in Opp. 9.

However, the Seventh Circuit's decision in this case limited *Osaghae* "to situations in which the Board 'has acted improperly' in preventing an asylum petitioner from placing evidence before it." Pet. App. 16a. On the question presented in this case, the court agreed with the Ninth Circuit and held that Section 2347(c) relief is not available when discretionary reopening mechanisms exist at the agency level. See *Ramirez-Gonzalez v. INS*, 695 F.2d 1208 (9th Cir. 1983). *Contra*

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that petitioner, like the applicants in *Castillo-Villagra* and *Ulloa*, did not file such a motion. The INS thus has provided no basis for denying our petition on the merits.

Becerra-Jimenez v. INS, 829 F.2d 996 (10th Cir. 1987); *Dolores v. INS*, 772 F.2d 223 (6th Cir. 1985); *Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988).[5]

The INS's effort to distinguish the Tenth Circuit's decision in *Becerra-Jimenez v. INS*, 829 F.2d 996 (1987) on the ground that it "had no occasion in that case to consider whether a remand would be required in every case in which new evidence was proffered" (Br. in Opp. 10) misses the point entirely. As quoted in the petition (at 24-25), the Tenth Circuit expressly held that the reopening mechanisms contained in 8 C.F.R. § 3.2 can in no way limit an applicant's right to seek a remand under Section 2347(c). In the words of the INS, the court "rejected the government's categorical argument that Section 2347(c) was rendered completely inapplicable to Board proceedings by the possibility that the Board would consider new evidence pursuant to motions to reopen." *Ibid.* Yet, the Seventh Circuit here reached precisely the opposite result and *accepted* the "government's categorical argument" by holding that petitioner could not seek a remand under Section 2347(c) given the reopening mechanisms at the Board. See Pet. App. 16a-17a. Indeed, the court acknowledged this conflict in its decision. Pet. App. 17a n.9 (noting that unlike this case, "[o]ther circuits have held without reference to improper action that remand may in certain circumstances be appropriate").

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[5] The INS's claim (at 5 n.12) that the law of the Fifth Circuit in this area is unclear is wrong. In its most recent ruling, *Bernal-Garcia v. INS*, 852 F.2d 144 (1988), the Fifth Circuit ordered a remand under Section 2347(c) without regard to the fact that the petitioner in that case had not filed a motion to reopen. In doing so, the court of appeals reaffirmed its prior ruling in *Coriolan v. INS*, 559 F.2d 993 (1977), rejecting the view that reopening mechanisms at the Board must be pursued in the first instance. *Bernal-Garcia*, 852 F.2d at 147 ("we apply *Coriolan*'s principles to this case and remand [under Section 2347(c)] for reconsideration of Bernal's claims in light of [the newly-adduced evidence]").

III. THE CONFLICT AMONG THE CIRCUITS IMPLICATES FUNDAMENTAL CONSTITUTIONAL ISSUES CRITICAL TO THE ADMINISTRATION OF FEDERAL LAW

Recent decisions of the courts of appeals illustrate the great practical and constitutional significance of the questions presented for virtually all forms of agency adjudication. While the INS contends that "[t]he practical difference between the rules of the various circuits * * * is quite minimal at this time" (*Rhoa-Zamora* Br. in Opp. 11), even those judges who support the INS's position fervently disagree with this view and acknowledge the critical need for immediate resolution of the conflict among the circuits on this issue.

In *Gomez-Vigil v. INS*, ___ F.2d ___, 1993 WL 84945 (9th Cir. March 26, 1993), the court of appeals reaffirmed its earlier due process holding in *Castillo-Villagra*. Judge Aldisert, sitting by designation, wrote a separate concurrence sharply criticizing the holding in *Castillo-Villagra* and emphasizing the fundamental constitutional issues that are at stake and their applicability to all forms of agency adjudication:

> The legal precept underlying *Castillo-Villagra* is not limited to INS administrative law. The decision has powerful precedential authority. It was not an airline super-saver excursion ticket good for this day and flight only. Because the panel bottomed its decision on constitutional law, it has a serious potential as a precedent--at least in this judicial circuit--to disturb the long-standing, recognized practice of federal agencies to take administrative notice of facts, and to draw inferences from those facts, a practice authorized by Congress and a host of federal regulations. I feel it necessary to repeat that although INS lawyers decided not to ask for en banc reconsideration or to file a petition for certiorari, this does not mean that *Castillo-*

> *Villagra* is an interpretation of immigration law only; it is a flat, if not imperial, statement of constitutional law. . . . [I]t has a potential effect on all agencies regulated by the Administrative Procedure Act (APA) at least in this judicial circuit. . . . This is strong medicine. And the ramifications could be widespread.

Gomez-Vigil, 1993 WL 84945, at *14 (Aldisert, J., concurring). Judge Fletcher also filed a separate concurrence emphasizing her support for the holding in *Castillo-Villagra*.

Petitioner disagrees with Judge Aldisert on the merits of the issues presented by this case. But his analysis of the importance of the constitutional questions is undeniably correct. This Court should grant the petition to resolve the conflict among the circuits on these important issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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